

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>Reexamination of the Comparative</b>	)	<b>MM Docket No. 95-31</b>
<b>Noncommercial Educational</b>	)	
<b>Applicants</b>	)	
	)	
<b>Association of America's Public</b>	)	
<b>Stations' Motion for Stay of Low</b>	)	
<b>Power Television Auction (No. 81)</b>	)	

**COMMENTS OF BOOTH, FRERET, IMLAY & TEPPER, P.C.**

The communications law firm of Booth, Freret, Imlay and Tepper, P.C. (BFIT), for itself and on behalf of numerous broadcast licensees and permittees which are clients of the law firm, hereby respectfully submits its comments in response to the Second Further Notice of Proposed Rule Making (the Notice), FCC 02-44, released February 25, 2002 in the captioned proceeding. The Notice seeks comment on various options for resolving mutual exclusivity between and among commercial and non-commercial educational (NCE) broadcast applicants. BFIT's principal interest in this proceeding relates to resolution of mutual exclusivity in the AM Broadcast Service.

1. In MM Docket 97-234, the Commission implemented rules for competitive bidding in the broadcast service. In that proceeding, the Commission clarified that, prior to consideration of the applications for new or major change AM broadcast service, and prior to any auction proceeding, an analysis of applications proposing different communities of license must be made under Section 307(b) of the Communications Act. *See, the First Report*

*and Order*, FCC 98-194, released August 18, 1998, at paragraph 115. Because the statutory auction authority of the Commission did not modify any other statutory obligation of the Commission, Section 307(b) analyses are clearly required in advance of any other comparative analysis of applicants. In the AM Broadcast Service, applicants which are mutually exclusive typically specify different communities, which may be separated by hundreds of miles. Therefore, Section 307(b) review of mutually exclusive AM applications is most often determinative. These characteristics of AM applications are vastly different from those of FM or Television applications.

2. In the rare cases in which mutually exclusive applications are not resolved by the Section 307(b) analysis, technical amendments may frequently be used to resolve mutual exclusivity.<sup>1</sup> It is strongly recommended that in the AM broadcast service in particular, the Commission seek to resolve mutual exclusivity by liberally permitting technical amendments by applicants.

3. The Notice, at paragraph 9, notes that Section 397(6) of the Communications Act defines the term "noncommercial educational broadcast station" as a radio or television station which:

is eligible to be licensed by the Commission as a noncommercial radio or television broadcast station and which is owned and operated by a public agency or nonprofit foundation, corporation or association...

The category also includes municipalities which transmit educational programming. These

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<sup>1</sup> While technical amendments are strongly supported, financial settlements are strongly opposed. Financial settlements encourage the filing of frivolous applications.

types of applicants are exempt from the competitive bidding process. In *NPR v. FCC*, the United States Court of Appeals for the D.C. Circuit held that "nothing in the Act authorizes the Commission to hold auctions for licenses issued to NCE's to operate in the unreserved spectrum." The holding was premised on the fact that Section 309(j)(2) of the Act denied the Commission the authority to use competitive bidding "based on the nature of the station that ultimately receives the license and not on the part of the spectrum in which the station operates."

4. In the AM Broadcast Service, there is no such thing as an NCE license. AM broadcast licenses are occasionally issued to nonprofit organizations and municipalities, but the license is not classified as a commercial or NCE license. Stations licensed in the AM service can operate on a commercial basis, or a non-commercial basis, at will. Though footnote 6 of the Notice states that "the Commission licenses AM NCE stations on an application-specific basis", and that such stations must demonstrate that they meet NCE eligibility requirements, this is somewhat misleading. In fact, the license that is issued to an applicant which states that it intends to operate on a non-commercial basis is not conditioned on or limited to non-commercial operation. Such a licensee may, without prior notice to the Commission or prior approval, convert to commercial operation any time after the license is issued or acquired. It may, as well, assign the license to a commercial entity which can operate the station on a commercial basis. No Commission approval is required for such commercial operation.

5. Therefore, an applicant for an AM broadcast license does not fall within the definition of Section 397(6) of the Communications Act, nor is such an applicant subject to

an exemption from competitive bidding pursuant to the Court of Appeals' holding in *NPR v. FCC*. As the nature of the station is the determining factor according to the Court of Appeals, it is therefore the obligation of the Commission to subject to competitive bidding all mutually exclusive AM applicants which cannot resolve their mutual exclusivity by technical amendments or Section 307(b) analyses.

6. Even if the Commission disagrees with the above comments, and believes that there can in fact be an NCE AM class of license, the fact that the AM broadcast service is a mature service, and there is little opportunity for new AM facilities generally, strongly supports Option 2 of the Notice. Option 2, discussed at paragraph 12 of the Notice, would permit NCE entities to apply for AM construction permits, but would subject those applications to dismissal if there is a mutually exclusive application filed by a commercial applicant. Option 2 is consistent with both current practice and the Court's ruling, in that it would allow NCE entities to apply for new AM facilities, and to make major changes in existing facilities. At the same time, Option 2 recognizes that there are no reserved frequencies in the AM band for NCE applicants.

Therefore, the foregoing considered, the law firm of Booth, Freret, Imlay & Tepper, P.C. respectfully requests that the Commission determine that all AM applicants are subject to the competitive bidding process, unless mutual exclusivity can be resolved through technical amendments or through Section 307(b) analyses by the Commission. In the alternative, the Commission should, with respect to AM applications, utilize option 2 as proposed in the Notice.

Respectfully submitted,

**Booth, Freret, Imlay & Tepper, P.C.**

By: \_\_\_\_\_  
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